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No. 02-1028

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

JAMES N. KIRBY PTY LIMITED D/B/A KIRBY ENGINEERING AND ALLIANZ AUSTRALIA LIMITED
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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March 21, 2003

HBP

QUESTIONS PRESENTED

1. Did the court of appeals err in construing the terms of a bill of lading contract to determine that an Australian transportation company contracted with an Australian manufacturer as a "carrier," thereby agreeing to assume responsibility for the carriage of the manufacturer's goods, rather than as an "agent," which would have involved agreeing only to conclude a contract of carriage with another carrier on the manufacturer's behalf?

2. Did the court of appeals err in determining that a bill of lading using general language mentioning servants, agents, and independent contractors did not adequately specify a sub-sub-subcontractor railroad with "sufficient clarity," as required by this Court's decision in *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297 (1959), to extend the maritime-based defenses of the Carriage of Goods by Sea Act to that inland carrier?

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, respondents James N. Kirby Pty Limited d/b/a Kirby Engineering and Allianz Australia Limited state the following:

James N. Kirby Pty Limited d/b/a Kirby Engineering, an Australian corporation, has no parent company, and no publicly owned company owns 10% or more of its stock.

Allianz Australia Limited, which was known as MMI General Insurance, Ltd. when this litigation began, is a wholly owned subsidiary of Allianz AG, Munich, a German public stock corporation. Allianz AG has no parent company, and the only publicly owned company that owns 10% or more of its stock is Münchener Rückversicherungs-Gesellschaft AG.

For the convenience of the Court when referring to the parties in the case, we will continue to refer to co-respondent Allianz Australia Limited as "MMI General Insurance, Ltd." (or "MMI"), which was the name in use at the time of the relevant transactions.

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INTRODUCTION

This case, brought in diversity to allege state tort-law claims, involves the interpretation of two bills of lading. Petitioner Norfolk Southern asserts that these two contracts limit its liability for the damages caused when its train derailed. International Cargo Control Pty Ltd. ("ICC"), an Australian company that undertakes to transport goods to foreign destinations, issued the first bill of lading to respondent James N. Kirby Pty Limited ("Kirby"), an Australian manufacturer. Hamburg Südamerikanische Dampfschifahrts-Geseilschaft Eggert & Amsinck ("Hamburg Süd"), a German carrier, issued the second bill of lading to ICC.

The Eleventh Circuit rejected Norfolk Southern's contention that it should be the third-party beneficiary of those contracts and thereby limit its own liability. The first contract – the only one to which Kirby was a party – contained no reference limiting the liability of inland carriers, and the court held that it lacked the specific indicia required to extend the limitations of liability to a sub-sub-subcontractor, which was Norfolk Southern's relationship to ICC. The second bill of lading was irrelevant because Kirby was not a party to that contract and ICC had not acted as Kirby's agent in dealing with Hamburg Süd. The court's conclusions involved only matters of contract interpretation; the court did not construe any federal statute or decide any question of federal law. The court below followed this Court's decision in *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297 (1959), and explained why its decision was not in conflict with the decision of any other court given the particular facts.

Notwithstanding the extraordinarily fact-based issues presented, Norfolk Southern contends that this case raises not one but two issues under the Carriage of Goods by Sea Act ("COGSA") on which this Court's further review is "imperative." Pet. 29. That contention is remarkable. In the 67-year history of the statute, this Court has only three times decided issues raised by the statute, and

this case does not even concern an issue of COGSA construction. Petitioner's contention is all the more remarkable because (contrary to the impression that the petition strives to create) COGSA was intended to regulate *vessel* carriers, not railroads; the result that Norfolk Southern seeks can be obtained by better contractual arrangements between the commercial parties; and an ongoing international diplomatic process is already addressing the two issues that Norfolk Southern raises before this Court.

STATEMENT

1. This case concerns a multimodal, multiparty operation to transport equipment from Australia to the United States. One key role in this transaction was played by a "freight forwarder," a term that in international transactions can be used for an entity that, in varying circumstances, plays many roles and different roles at different times. *See generally* HUGH M. KINDRED & MARY R. BROOKS, MULTIMODAL TRANSPORT RULES 13-15 (1997); PAUL M. BUGDEN, FREIGHT FORWARDING AND GOODS IN TRANSIT 1-7 (1999).[1] A proper understanding of the fact-specific and multi-faceted roles of a freight forwarder is important for the Court's understanding of this case and the context in which the court below rendered judgment.

Historically, freight forwarders acted as agents, usually on behalf of a cargo owner but sometimes on behalf of an ocean carrier. As an agent, a forwarder would typically arrange a contract of carriage between its customer, the

[1] Even the term "freight forwarder" creates confusion, as the entities that perform the various roles of the freight forwarder can be called different names. *See, e.g.*, KINDRED & BROOKS, *supra*, at 11-16 (referring to freight forwarders as "third party logistical service providers" or "TPLs"); *id.* (referring to "non-vessel-operating carriers" or "NVOCs"); 46 U.S.C. app. § 1702(17)(B) (referring to "non-vessel-operating common carrier" or "NVOCC"); BUGDEN, *supra*, at 63-64; PETER JONES, FIATA LEGAL HANDBOOK ON FORWARDING 70-71 (2d ed. 1993). Indeed, the industry's trade group in the United States is named the "Transportation Intermediaries Association," *see* www.tianet.org, with the term "transportation intermediary" also being a term used by Congress. *See* 46 U.S.C. app. § 1702(17).

cargo owner, and an ocean carrier. The ocean carrier would issue its bill of lading to the cargo owner, who would be named as "shipper" on the bill of lading. The cargo owner would be responsible for paying the ocean carrier's freight charges (although the forwarder might assume secondary liability). The forwarder was responsible for the careful performance of its agency functions, but did not assume the carrier's liability for the safe delivery of the cargo.[2]

Beginning in the late 1960s and early 1970s in Europe, and in the early 1980s in North America, forwarders expanded their services and themselves assumed a carrier's responsibility for the delivery of the cargo. *See, e.g.*, KINDRED & BROOKS, *supra*, at 12-13. At times they still acted as agents for cargo owners, but increasingly they acted as a principal when entering into a contract of carriage with a cargo owner. As principal, a forwarder issues its own bill of lading to the cargo owner, who is named as "shipper." The forwarder then subcontracts some or all of the responsibilities for carriage. Most significantly, it typically subcontracts with an ocean carrier for the transportation of the goods by sea. The ocean carrier issues its bill of lading to the forwarder, who is named as "shipper" on this second bill of lading. The cargo owner pays the forwarder's freight, while the forwarder pays the ocean carrier's freight. *See generally* RAMBERG, *supra*, at 18-29; BUGDEN, *supra*, at 48-49. The role that the forwarder plays varies from case to case and requires a careful analysis of the particular contracts involved in the transaction.

In recognition of the changing needs of the transportation industry (including the developments discussed here), the United Nations Commission on International Trade

[2] *See generally* JAN RAMBERG, THE LAW OF FREIGHT FORWARDING AND THE 1992 FIATA MULTIMODAL TRANSPORT BILL OF LADING 13-14 (1993); KINDRED & BROOKS, *supra*, at 12-15; BUGDEN, *supra*, at 1-7; JONES, *supra*, at 21-22; GERALD H. ULLMAN, THE OCEAN FREIGHT FORWARDER, THE EXPORTER AND THE LAW 5 (1967).

Law ("UNCITRAL") is currently working to update the international convention on which COGSA is based, *see, e.g.*, UNCITRAL, *Report of Working Group III (Transport Law), Tenth Session*, U.N. doc. no. A/CN.9/525 (Oct. 7, 2002), and the United States is an active participant in these negotiations, *see id.* ¶ 18; UNCITRAL, *Report of Working Group III (Transport Law), Ninth Session*, U.N. doc. no. A/CN.9/510, ¶ 15 (May 7, 2002).[3] This project began almost five years ago, *see* Stuart Beare, *Liability Regimes: Where We Are, How We Got There and Where We Are Going*, 2002 LLOYD'S MAR. & COM. L.Q. 306, 306, and it involves not only governments and intergovernmental organizations interested in trade, but also specialized organizations representing the affected commercial parties, *see, e.g., id.*; UNCITRAL, *Report of Working Group III (Transport Law), Tenth Session, supra*, ¶ 20(c); UNCITRAL, *Compilation of Replies to a Questionnaire*, U.N. doc. no. A/CN.9/WG.III/WP.28, at 3-11, 32-43 (Jan. 31, 2003). The Association of American Railroads ("AAR"), of which petitioner is a prominent member, is a participant in the project. *See, e.g., id.* at 32-34.

2. The transaction here concerns ten containers of machinery that Kirby sold to General Motors for use at its factory in Huntsville, Alabama. Kirby contracted with ICC, an Australian freight forwarder, which issued its own bill of lading to Kirby in which it designated itself as the carrier of the goods. Clause 8.6(b) limited the issuer's liability to $500 per package when COGSA is compulsorily applicable. *See* Pet. App. 67a. Clause 10.1, a Himalaya clause (*see id.* at 2a & n.1), extended the issuer's defenses to other beneficiaries by providing, in pertinent part (*id.* at 67a):

> These conditions apply whenever claims relating to the performance of the contract evidenced by this FBL [*i.e.*, this bill of lading] are made against any

[3] The U.N. documents cited in this brief are available on the UNCITRAL website at www.uncitral.org.

> servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract, whether such claims are founded in contract or in tort . . . .

ICC, in turn, arranged with Hamburg Süd to carry the goods from Sydney to Huntsville. Hamburg Süd issued a bill of lading to ICC, in which Hamburg Süd designated itself as the carrier and ICC as the shipper. This bill of lading also contained a limitation clause and a Himalaya clause.

Hamburg Süd carried the cargo itself on the ocean voyage from Sydney to Savannah, Georgia, and then subcontracted with Columbus Line USA, Inc., a separately incorporated subsidiary of Hamburg Süd, to deliver the cargo from Savannah to Huntsville. Columbus Line USA, in turn, subcontracted with Norfolk Southern to perform the Savannah-to-Huntsville inland carriage. During that final leg, the Norfolk Southern train (operated by a Norfolk Southern crew on a Norfolk Southern track) derailed. Kirby's cargo suffered more than $1.5 million in damages.

3. Kirby and MMI General Insurance, Ltd. ("MMI")[4] filed this diversity suit to recover damages for the derailment. Norfolk Southern denied liability, but in a motion for partial summary judgment argued that its liability (if any) was limited to $5,000. That motion was based on the limitation and Himalaya clauses in the bills of lading. The district court granted Norfolk Southern's motion.[5]

[4] For the convenience of the Court when referring to the parties in the case, we will continue to refer to respondent Allianz Australia Limited as "MMI General Insurance, Ltd." (or "MMI"), which was the name in use at the time of the relevant transactions.

[5] As the court of appeals noted, the procedural history was more complicated, but ultimately not relevant to the issues raised by Norfolk Southern in its petition for a writ of certiorari. That procedural history is detailed in the briefs below. *See* Kirby C.A. Br. 4-5.

4. In an interlocutory appeal, the court of appeals reversed. The court's analysis proceeded in two steps: first, deciding whether Kirby was bound by the Hamburg Süd bill of lading when Kirby was not a party to it; and, second, assessing whether the ICC bill of lading was sufficiently clear to extend the benefits of the limitation clause to a sub-sub-subcontractor and inland carrier like Norfolk Southern.

a. The court determined that Kirby was not bound by the terms of the Hamburg Süd bill of lading because Kirby was not a party to that contract: "ICC, not Kirby, hired Hamburg Sud, and ICC, not Kirby, is named on the [Hamburg Süd] bill as the shipper of the goods, which means that Kirby did not itself agree to the terms of the bill." Pet. App. 6a. The "pivotal question," therefore, was whether ICC "had authority to and did bind Kirby to the terms of the bill, including its package limitation and its Himalaya clause." *Id.* at 6a-7a. After a detailed factual analysis of the relevant contracts in the transaction, the court determined that ICC was not acting as Kirby's agent at the time it contracted with Hamburg Süd. *Id.* at 7a.

A number of factors pointed to this conclusion. First, the "structure of the transaction" revealed that the parties were contracting as principals. *Id.* Second, the ICC bill of lading "expressly states that ICC was undertaking 'to *perform* . . . the entire transport,' or '*in [its] own name* to procure the performance of the entire transport.'" *Id.* at 8a (quoting ICC bill of lading) (alterations and emphasis in original). The court concluded that the "plain language" of that bill "clearly intended" that ICC "would act as a principal in any subsequent contracts it entered into for the transport of the machinery" and would "assume[] responsibility 'for the acts or omissions of its servants or agents,'" language the court observed would not be necessary if ICC were acting as Kirby's agent. *Id.*

Third, the court concluded that the "form of the ICC bill also shows [that] ICC was a principal, not Kirby's agent."

Id. Commentary from the drafters of the "FBL" (the standard form that ICC used) "indicates that, when the FBL form is used, the freight forwarder assumes the role of carrier and therefore becomes a principal." *Id.* (citing RAMBERG, *supra*, at 7). Fourth, the court held that key provisions in the Hamburg Süd bill of lading "reinforce[d] the conclusion that ICC was acting as principal, and not as Kirby's agent." *Id.* at 9a. Finally, the court noted that its conclusion was consistent with circuit precedent that "a freight forwarder should not automatically be taken to be the agent of the party who hires it to facilitate the shipment of goods." *Id.*

The court rejected Norfolk Southern's argument that, notwithstanding all of those contrary indications, ICC "must have been Kirby's agent" by operation of a federal statute that requires a Federal Maritime Commission ("FMC") license for an ocean transportation intermediary. *Id.* at 10a n.9. In making that argument, Norfolk Southern had invoked a licensing requirement that "was not in force at the time" the bills of lading were issued; the provision did not apply by its plain terms to ICC as "an Australian company doing business in Australia"; Norfolk Southern had not met its burden of showing that ICC was unlicensed; and, finally, Norfolk Southern had not established that, even if ICC had failed to obtain a license, its failure "would work to Kirby's detriment by rendering Kirby bound to the terms of a contract entered into by a party it had never made its agent." *Id.* at 10a-11a n.9.

b. Having explained why Kirby could not be bound by the Hamburg Süd bill of lading, the court then addressed whether Norfolk Southern was entitled to the limitation of liability defenses contained in the ICC bill of lading. The court explained that this Court's decision in *Herd* required that a clause purporting to limit the liability of parties hired by the carrier had to be drafted "with sufficient clarity to specifically identify those parties." *Id.* at 11a. In reviewing the two bills of lading, the court below noted this Court's admonition that "'contracts purporting

to grant . . . limitation of liability must be strictly construed and limited to their intended beneficiaries.'" *Id.* (quoting *Herd*, 359 U.S. at 305) (ellipsis in original). The court then explained that, following *Herd*, the Eleventh Circuit's prior cases had imposed a "clarity of language" requirement to ensure that the contract "is drafted with 'language expressing a clear intent to extend the benefits to a well-defined class of readily identifiable persons,'" and to allow that clause to be enforced "only by members of that well-defined class." *Id.* at 12a (quoting *Hale Container Line, Inc. v. Houston Sea Packing Co.*, 137 F.3d 1455, 1465 (CA11 1998)).

In applying those principles to the ICC bill of lading, the court below concluded that the phrase "other person" was too vague to satisfy the clarity of language requirement, so the question was whether Norfolk Southern was covered by the words "servant, agent, or . . . independent contractors." *Id.* With its focus on "independent contractors," the court explained that, when a subcontractor had been directly engaged by a carrier, such as a "stevedore" or "terminal operator," it was not necessary for the contract to enumerate specific categories of agents or independent contractors. *Id.* at 12a-13a (collecting cases). But when, as here, ICC had not engaged Norfolk Southern, the railroad could not rely on the Eleventh Circuit's "clarity of language" cases. "If Kirby and ICC had intended for the protections of the ICC bill to extend to sub-sub-contractors, they could have said so." *Id.* at 13a.

The court "recognize[d] that the Ninth Circuit has arguably taken a different view." *Id.* (citing *Akiyama Corp. of Am. v. M.V. Hanjin Marseilles*, 162 F.3d 571, 574 (CA9 1998)). The court then explained why it did not perceive a conflict with the Ninth Circuit. First, it noted that in *Akiyama* the terms being invoked were "descriptive," such as "stevedore" and "terminal operator," and not "relational." *Id.* at 14a n.11. As the court explained, the "result, though not the language, of *Akiyama* conforms to

this rule." *Id.*[6] Second, the court held that cases extending the limitation of liability to inland carriers "seem to support the principle that a special degree of linguistic specificity is required." *Id.* at 15a-16a. The court explained this "linguistic specificity" principle in light of how the cases extending Himalaya clauses had been decided, with the extensions being afforded to workers such as stevedores, terminal operators, and similar parties "whose work is done at or close to the point where the cargo is unloaded from the ship." *Id.* at 16a.

The "caution" the court felt obliged to exercise was not obviated by the fact that the bills of lading here were "through bills," meaning they had "provided for transport to an inland destination rather than merely to the port of discharge." *Id.* The drafters of the FBL form had based their model bill of lading on a "network" approach in which "each leg of a journey should be subject to the liability rules governing the mode of transport for that leg." *Id.* at 17a. Because rail carriage has its own liability regime, the court reasoned that the Himalaya clause protections were intended to apply only to "parties who are, so to speak, between liability regimes, at the fringes of the sea regime – stevedores, terminal operators, and the like." *Id.* Accordingly, "if the Himalaya clause is to extend inland, it must say so with specificity, as, for example, did the Himalaya Clause in the Hamburg Sud bill when it clearly identified as among its beneficiaries 'all participating (*including inland*) carriers.'" *Id.* (emphasis in original). Such a specificity requirement, in the court's view, better comported with "*Herd*'s principle that liability limi-

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[6] The court below also noted that the *dicta* in *Akiyama* stating that a party seeking to invoke the Himalaya clause "need not be in privity with the carrier" is implicitly contradicted by an earlier Ninth Circuit case, *Mori Seiki USA, Inc. v. M.V. Alligator Triumph*, 990 F.2d 444, 450-51 (1993). Pet. App. 14a-15a n.11.

tations in bills of lading must be narrowly construed." *Id.* at 18a.[7]

c. The court denied Norfolk Southern's petition for rehearing en banc without calling for a response and without dissent. *Id.* at 39a-40a.

REASONS FOR DENYING THE PETITION

I. Norfolk Southern's first question presented ignores that the particular facts and circumstances determine whether a freight forwarder acts as the cargo owner's agent (and thereby binds the cargo owner to subsequent contracts) or acts as the principal (and thereby assumes the responsibilities and liabilities for the carriage of goods and does *not* bind the cargo owner to its subcontracts). The court below relied on numerous facts to hold that ICC was not Kirby's agent but instead assumed responsibility (and liability) for any loss in the bill of lading with Hamburg Süd. Even the dissenting judge recognized that this issue is fact-bound. The judges' disagreement over how to construe the relevant contracts is not an issue of general importance warranting this Court's review. Even if this Court were interested in any wider issues, this case would provide a poor vehicle for resolving them.

II. There is no conflict between the Eleventh and Ninth Circuits on the second question presented. As the court below explained, the Ninth Circuit's holdings are consistent with the Eleventh Circuit's announced rule. In any event, Norfolk Southern ignores the court's alternative holding that a "special degree of linguistic specificity" is necessary before a maritime-based limitation of liability clause may be extended to inland carriers. *See* Pet. App. 16a. That holding provides an independent basis for affirmance as well as another explanation for why the decision below does not conflict with any Ninth Circuit decision. Even if a conflict were to arise, this Court would not need to resolve it, and this case would in any event provide a poor vehicle for doing so.

[7] Judge Siler, visiting from the Sixth Circuit, dissented. He believed that ICC was acting as Kirby's agent, and not as a principal, although he recognized that a freight forwarder can be a principal in certain circumstances. Pet. App. 19a. Accordingly, in his view, Kirby was bound by ICC's contract with Hamburg Süd.

I. Whether ICC was Kirby's agent is a fact-bound question that raises no issue of general importance warranting this Court's review

A. The case does not raise the question presented in the petition

In an effort to make a fact-bound decision appear to be of general importance, Norfolk Southern has framed the first question presented so as to have virtually no relation to the court of appeals' decision. As we explain, and as even the dissent below acknowledged, a freight forwarder can take on different roles, including that of a principal with responsibility for undertaking the carriage of the goods. *Cf.* p.3, *supra*; Pet. App. 19a (noting that "a freight forwarder can be a principal"). In framing the question as it has,[8] Norfolk Southern appears to be asking for a general rule wholly divorced from the parties' intentions, the actual language in the contracts they ratify, and the practices that govern the industry. The true question raised in this case is whether the court of appeals properly construed the relevant contracts to hold that ICC was not acting as Kirby's agent when it contracted with Hamburg Süd. Even the authorities on which petitioner relies to explain the FBL acknowledge that a fact-specific analysis is required. *See, e.g.*, RAMBERG, *supra*, at 7 (noting that the freight forwarder "shifts colour to fit into the legal environment of his varying services" but when it uses the FBL "the freight forwarder progresses from the legal jungle and clearly establishes himself as a carrier with carrier liability").

[8] Pet. i ("Whether a cargo owner that contracts with a freight-forwarder for transportation of goods to a destination in the United States is bound by the contracts that the freight forwarder makes with carriers to provide that transportation.").

Thus, if this Court were to grant review of the first question as posed in the petition, the only reasonable answer would be, "It depends on the facts of each case." As we explain, and as the court below stressed, there is nothing talismanic about ICC's calling itself a "freight forwarder." Whether in any given case a freight forwarder may be treated as a principal or as the cargo owner's agent will depend on the facts.

In this case, the court below undertook a careful and thoughtful analysis of the relevant contracts and concluded that on these facts ICC was not Kirby's agent. Now that Norfolk Southern has finally[9] admitted that ICC acted as a carrier, *i.e.*, as a principal, in its dealings with Kirby, *see, e.g.*, Pet. 2, 14-15 n.4, 16, 21, it is completely illogical for Norfolk Southern also to contend that ICC was also Kirby's agent. An entity cannot be a principal and an agent with respect to the same duties owed to the same party at the same time. *See, e.g.*, RESTATEMENT (THIRD) OF AGENCY § 1.01 (Tent. Draft No. 2, 2001) ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests or otherwise consents so to act."). Unhappy with the result obtained, Norfolk Southern twists the facts in an effort to avoid this conclusion,[10] but no amount

[9] In the court of appeals, Norfolk Southern argued that ICC could not be a carrier – the exact opposite of its current position. *See* pp. 6-7, *supra*; pp. 22-23, *infra*.

[10] For example, Norfolk Southern quotes the ICC bill of lading for the proposition that ICC "may engage other carriers to perform the contract" (Pet. 6), but its quotation ellipses out the crucial words "in its own name." Thus, as the court below held, ICC "was undertaking 'to *perform* . . . the entire transport,' or '*in [its] own name* to procure the performance of the entire transport.'" Pet. App. 8a (alterations and emphasis in original). The court emphasized the "in its own name" language because that phrase demonstrated the intent that ICC "would act as a principal in any subsequent contracts it entered into for the transport of the machinery." *Id.*

of selective distortion of the contracts will change the fact that the parties intended that ICC would not act as Kirby's agent when it contracted with Hamburg Süd.

B. This Court's review of this issue is unnecessary

1. It is well settled that a party generally cannot be bound by a contract to which it is not a party. *See generally* E. ALLAN FARNSWORTH, CONTRACTS § 3.1, at 110 (3d ed. 1999). Indeed, that proposition is so well settled that Norfolk Southern does not question it, directing its fire instead at the proposition that ICC was Kirby's *de facto* agent. Pet. 18 (arguing that the court should follow the "commercial norm"). But, as the court properly recognized, "ICC's status as a freight forwarder is not itself dispositive of the question, because freight forwarders 'may act as agents or as principals, depending on the facts.'" Pet. App. 7a (quoting Stephen G. Wood, *Multimodal Transportation: An American Perspective on Carrier Liability and Bill of Lading Issues*, 46 AM. J. COMP. L. 403, 413 (1998)). *See also id.* at 19a ("a freight forwarder can be a principal").

In applying that principle to the facts presented, the court below engaged in a highly nuanced factual analysis of the contracts, the parties' intent, and the structure of the transaction. It concluded that ICC and Kirby evidenced the requisite intent to establish by contract that ICC was to be the carrier as a principal and not to perform its duties as Kirby's agent. That decision is simply a fact-bound – and correct – application of settled law.

2. Norfolk Southern offers a plethora of cases supposedly in conflict with the Eleventh Circuit's judgment (Pet. 14-19), but the decision below does not conflict with the decisions of this or any other court.

a. Petitioner's assertion (Pet. 19) that the decision below is "in square conflict with" *The Lexington* (*New Jersey Steam Navigation Co. v. Merchant's Bank*, 47 U.S. (6 How.) 344 (1848)), is inexplicable. In *The Lexington*, the cargo owner recovered full damages from a negligent

party that was at least arguably a subcontractor. To the extent that the two cases are comparable, this is precisely the same result reached by the court below. Petitioner is simply wrong to say that the *Lexington* Court "went on to hold that the contractual limitation of the vessel owner's liability was binding on the cargo owners." Pet. 20. In fact, the Court held that the vessel owner's contractual limitation was *not* binding on the cargo owners, and it affirmed the lower court's award of full damages. 47 U.S. at 437. As the plurality[11] opinion declared, "the respondents [the vessel owners] are liable for the loss of the specie, notwithstanding the special agreement under which it was shipped." *Id.* at 385.

Even the *Lexington* plurality's *dicta* on which petitioner relies (Pet. 19-20) are readily distinguishable. Those statements arose in the context of deciding whether the cargo owner could sue the performing carrier on the relevant contract, not whether the cargo owner was bound by the contract.[12] As *The Lexington* was decided more than a decade before *Lawrence v. Fox*, 20 N.Y. 268 (1859), the seminal U.S. decision on third-party-beneficiary contracts, those statements are best seen as an early attempt to deal with third-party-beneficiary problems.[13]

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[11] In a 4-2-2 decision, the plurality opinion was by Justice Nelson, joined by Chief Justice Taney, Justice McLean, and Justice Wayne. 47 U.S. at 378-92. Justice McKinley did not participate. *Id.* at iii. Justice Catron, *id.* at 393-95, and Justice Woodbury, *id.* at 418-37, each concurred in the judgment. Justice Daniel, joined by Justice Grier, dissented. *Id.* at 395-418. Justice Grier's vote is noted in the Court's Minutes for March 7, 1848, at p. 5764, and in the LEXIS report of the case.

[12] The most relevant authority cited by the plurality (47 U.S. at 381), *Sanderson v. Lamberton*, 6 Binney 129 (Pa. 1813), also arose in that context, *see id.* at 131-32, which helps clarify the focus of the plurality's discussion.

[13] Even within the correct context, the *dicta* are not so straightforward as they appear when quoted out of context. The plurality's analysis still turned on the facts. For example, Justice Nelson specifically noted that the result would have been different if the contract had been under seal. 47 U.S. at 380. In the ordinary course of events, the *Lexington* contract would have been under seal. The parties' original contract had been under seal, *see id.* at 344-45, but they were then operating under an unsealed renewal, *see id.* at 346, pending a formal renewal that had been delayed due to bad weather, *see id.* at 365. Of course the law has developed considerably since the era when it mattered whether a contract was under seal. *See generally* E. ALLAN FARNSWORTH, CONTRACTS § 2.16, at 86-87 (3d ed. 1999). The important point is that the relevant contracts must be construed in light of the facts and the prevailing law. There is no general law that a freight forwarder is always the cargo owner's agent. *See* p. 3, *supra*. To the extent that this is ultimately Norfolk Southern's position, *The Lexington* provides no support.

Other decisions of this Court on which petitioner relies are also irrelevant. *Chicago, Milwaukee, St. Paul & Pacific Railroad v. Acme Fast Freight, Inc.*, 336 U.S. 465 (1949), involved a dispute between a freight forwarder and a performing carrier. The cargo owner was not involved. In *Great Northern Railway Co. v. O'Connor*, 232 U.S. 508 (1914), there is no suggestion that the freight forwarder assumed a carrier's obligations to the cargo owner (as ICC did in this case). Indeed, the court below cited *O'Connor* and implicitly distinguished it on that basis. Pet. App. 6a-7a. Even the language quoted in the petition (at 20) (noting the *O'Connor* plaintiff's remedy against the freight forwarder) demonstrates that the *O'Connor* Court viewed the freight forwarder simply as an agent and not as a carrier, for the remedies against a carrier would have been very different.

b. Nor does the decision below present a conflict with decisions in other circuits. In none of the cases cited by petitioner does a court of appeals conclude that a freight forwarder, on similar facts or a similarly worded bill of lading, must be viewed as a cargo owner's agent. Instead, petitioner offers up a hodge-podge of cases, most of which have nothing to do with the dispute the parties litigated and the court below decided.

In *Kukje Hwajae Insurance Co. v. M/V Hyundai Liberty*, 294 F.3d 1171 (CA9 2002), *cert. pending sub nom. Green Fire & Marine Ins. Co. v. M/V Hyundai Liberty*,

No. 02-813 (filed Nov. 22, 2002), the Ninth Circuit concluded that a non-vessel-operating common carrier ("NVOCC") had acted as a cargo owner's agent when contracting with a vessel carrier. Although *Kukje Hwajae* is an aberrational decision,[14] for it is inconsistent with the plain language of the Shipping Act's definition of an NVOCC, 46 U.S.C. app. § 1702(17)(B), it still does not conflict with the decision below.

First, the Ninth Circuit's decision turns primarily on the intermediary's NVOCC status. By contrast, it is unclear whether ICC was an NVOCC and the courts below never ruled on that issue. In the Eleventh Circuit, respondent expressed no view on the issue and petitioner argued vigorously that ICC could not have been an NVOCC. *See* pp. 22-23, *infra*. Although petitioner now argues that ICC *was* an NVOCC, *see id.* at 22, the parties never litigated that issue and thus the record is inadequate to support any conclusion, *see id.* at 22-23.

In addition, the Ninth Circuit – in sharp contrast with the court below – never analyzed the relevant factors that would have enabled it to make a reasoned finding that the NVOCC was the cargo owner's agent. Because the Ninth Circuit raised this theory *sua sponte* during oral argument, it reached its conclusion without the benefit of any

[14] The primary basis for the Ninth Circuit's decision was a stray sentence in an academic article that was taken out of context. *See* 294 F.3d at 1176 (quoting Martin Davies, *In Defense of Unpopular Virtues: Personification and Ratification*, 75 TUL. L. REV. 337, 395-96 (2000)). The real point of Prof. Davies's statement was that an NVOCC does not act as the ocean carrier's agent when it issues its own bill of lading, and thus the vessel in an *in rem* action should be deemed to ratify the vessel owner's bill of lading rather than the NVOCC's. Ironically, if the Ninth Circuit had followed Prof. Davies's actual argument instead of taking a careless sentence out of context, it would have reached the same conclusion – on the same grounds as the Second Circuit did in *Insurance Co. of N. Am. v. S/S American Argosy*, 732 F.2d 299 (CA2 1984) (discussed at p. 18, *infra*), on which the Ninth Circuit also relied. This alternative rationale for the Ninth Circuit's result in *Kukje Hwajae* provides another basis for distinguishing the case.

briefing, *see Green Fire* Pet. 8-9, or the development of an adequate record to address the issue.

In short, the record developed below is inadequate for an appellate court to resolve the principal question on which the Ninth Circuit decided *Kukje Hwajae* (the NVOCC status of the freight forwarder), and the record in that case is inadequate for an appellate court to resolve the principal question on which the Eleventh Circuit decided this issue (whether the freight forwarder was a principal or the cargo owner's agent). There is thus no firm basis for concluding that the cases conflict.

The *Kukje Hwajae* case also arose in a very different context from the one presented here. The defendant there was seeking to enforce the forum selection clause in its own bill of lading. As this Court has made clear, enforcement of such clauses is favored. *See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 537-39 (1995). Petitioner, in contrast, claims the benefit of a Himalaya clause in *another* carrier's bill of lading. This Court has equally made clear that such efforts are to be "strictly construed and limited to intended beneficiaries." *Herd*, 359 U.S. at 305.

The other circuit court decisions that petitioner cites are at best only marginally relevant and none even comes close to constituting a square conflict. One, for example, involved different types of parties and different actions that bear no resemblance to this case. *See Morrow Crane Co. v. Affiliated FM Ins. Co.*, 885 F.2d 612, 613 (CA9 1989) (not a cargo damage case but an action between a cargo owner and its insurer in which the owner's "independent freight forwarding agent" acted simply as an agent to arrange shipment on the owner's behalf).

In other cases cited by petitioner, no freight forwarder or intermediate carrier was even involved, so there is no basis at all for asserting a conflict. *See, e.g., Carmen Tool & Abrasives, Inc. v. Evergreen Lines*, 871 F.2d 897 (CA9 1989) (rejecting consignee's claim that it was not bound by the actions of the shipper from which it derived its rights);

Puerto Rico Maritime Shipping Auth. v. Crowley Towing & Transp. Co., 747 F.2d 803 (CA1 1984) (without considering any argument that the cargo owner was bound by the carrier's bill of lading, holding that the carrier was not at fault under the Puerto Rico Civil Code when a lessee shipped the owner's property without permission). Not only did *Stolt Tank Containers, Inc. v. Evergreen Marine Corp.*, 962 F.2d 276 (CA2 1992), involve no freight forwarder or intermediate carrier, but the defendant vessel carrier's entitlement to limitation turned on the mandatory application of COGSA because the damage there (unlike the derailment here) occurred at sea, *see id.* at 279.

Finally, the cases involving NVOCCs are inapposite. *See SPM Corp. v. M/V Ming Moon*, 22 F.3d 523 (CA3 1994)[15] (indemnity dispute between an NVOCC and two co-defendants; references cited by petitioner (at 17) were not dispositive of court's conclusion but instead described the Eleventh Circuit's reasoning in another case); *Insurance Co. of N. Am. v. S/S American Argosy*, 732 F.2d 299 (CA2 1984) (characterization of the NVOCC's role was irrelevant to the case's outcome; court held that the vessel in the *in rem* action had not ratified the NVOCC's bill of lading because the vessel owner had issued its own bill of lading).

3. Even if a square conflict on the agency issue were to arise some day, petitioner offers no reason why this Court should resolve it. The purported reasons given for the "importance" of the issue – defeating "settled expectations" (*e.g.*, Pet. 2, 14, 21), and protecting "reliance interests" (*e.g.*, Pet. 3) – are unfounded and have no merit.

a. The decision below does not defeat settled expectations. The petition leaves the impression that Norfolk Southern expected to perform its contract with Columbus

[15] Petitioner also cites (at 18) an earlier aspect of this litigation. In *SPM Corp. v. M/V Ming Moon*, 965 F.2d 1297, 1305 n.9 (CA3 1992), the Third Circuit described an NVOCC as the shipper's agent. There was no indication or discussion of the factual context, and there was no suggestion that the parties contested the issue.

Line USA on the same terms as ICC and Hamburg Süd performed their contracts, and that its lack of privity with Kirby, ICC, and Hamburg Süd was a technicality that should be ignored in the interests of commercial convenience. The truth is remarkably different. Norfolk Southern's actual expectation at the time of the transaction was to rely on its own privity of contract argument to protect itself from the legal consequences of its negligence.

When Kirby filed its original claim with Norfolk Southern, the railroad replied on May 20, 1998, and June 9, 1998. Both letters stated:

> Under Norfolk Southern's Circular No. 1-A, which governed this shipment, Rule 16, Article B, Paragraph 4, Subparagraph (h) states that Norfolk Southern shall not be liable for loss damage or delay to lading to any party other than the Rail Services Buyer [defined under Rule 3, Paragraphs 16-18, as the "Contracting Party"]. [Norfolk Southern] will not be under any obligation to process any claim by any person other than the Rail Services Buyer.
>
> In this case, the rail services buyer is Columbus Line USA Inc. . . . In light of the [*sic*] this, your claim as submitted is respectfully declined.[16]

See Kirby Br. in Opp. to Mot. for Partial Summ. J., Exhs. 6-7 (N.D. Ga. filed Apr. 13, 2000); *see also* Kirby C.A. Reply Br. 24-25. Norfolk Southern's initial defense, there-

[16] Although this argument seems remarkable, harkening back to the era before *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916) (holding a negligent party liable for the injuries that it caused despite the injured party's lack of privity), it is in fact the position that the U.S. railroad industry regularly asserts. *See, e.g.*, Comments on Behalf of the Association of American Railroads [filed with the Maritime Administration, Dep't of Transportation], docket no. MARAD-2001-11135-12 (filed Sept. 13, 2002) (describing AAR members' reliance on this privity of contract argument); UNCITRAL, *Compilation of Replies to a Questionnaire*, U.N. doc. no. A/CN.9/WG.III/WP.28, at 32-34 (Jan. 31, 2003) (substantially identical comments filed with UNCITRAL). The AAR's arguments in this case, *see* AAR Amicus Br. 13-15, contrast sharply with its comments to MARAD and UNCITRAL.

fore, was that only Columbus Line USA could recover against the railroad because it was the only party in privity of contract with Norfolk Southern. Only when it became obvious that its privity of contract argument would be ineffective to defeat Kirby's tort claim (because Kirby was not a party to any contract governed by the Norfolk Southern circular) did petitioner change direction completely and settle on the new "expectation" that it now presents to this Court.

Nor does the decision below defeat the expectations of those who drafted the ICC bill of lading, which is the relevant contract in this action. As explained above, *see* p. 6, *supra*, and as recognized both by the court of appeals, Pet. App. 8a-9a, and by one of petitioner's principal authorites on the FBL, the primary purpose of the International Federation of Freight Forwarders Associations ("FIATA") in promulgating the FBL form was to provide a mechanism for a freight forwarder to become a "principal in the contract" rather than merely "an agent and intermediary," RAMBERG, *supra*, at 7. Petitioner, not the Eleventh Circuit, would defeat that settled expectation.

Finally, the record does not contain specific evidence of respondents' expectations at the time of the transaction, but they may be presumed to have had the expectations of most commercial parties in their positions. Kirby presumably intended to be bound by contracts to which it was a party, and not to be bound by contracts to which it was not a party. That is the very essence of freedom of contract, which most commercial parties seek. MMI presumably set its premium based on the assumption that it would have subrogation rights against those who caused any damage to the insured goods, and that a U.S. tortfeasor's liability would be limited only to the extent permitted by *Herd*.[17]

[17] Accordingly, there is no merit to petitioner's complaint that MMI receives a "windfall" from the decision below. Pet. 3. In fact, Norfolk Southern seeks a windfall. Having damaged the cargo and found its own (higher) limitation of liability under its circular to be untenable,

b. If Norfolk Southern had actually had the expectations that it now asserts, the commercial parties could have protected them by contract. It is important to keep sight of the fact that this is simply a contract interpretation case. Nothing that the court below did (or that this Court might do) will interfere with the ability of commercial parties to structure future transactions as they wish simply by entering into contracts that provide for the rights and obligations that they agree to accept. No court required ICC to issue a bill of lading on the FBL form. Future freight forwarders may use a different form if they object to the decision below. If FIATA wishes to revise its views in light of the Eleventh Circuit's treatment of the FBL, it may revise the form. If Norfolk Southern is unhappy with the terms in its customers' contracts, it can decline to participate in multimodal transactions, insist on its own contract with the cargo owner, or seek indemnity agreements in its own contracts with vessel carriers. *See, e.g., Nippon Yusen Kaisha v. International Import & Export Co.*, [1978] 1 Lloyd's Rep. 206 (Q.B. (Com. Ct.) 1977) (giving effect to a circular indemnity clause). This Court need not intervene to protect commercial parties from their failure to conclude the contracts that, in retrospect, they wish they had entered.

4. This Court's review of the decision below is also unnecessary because the ongoing diplomatic efforts at UNCITRAL, *see* pp. 3-4, *supra*, are addressing proposals that would bear directly on the need for the type of agency analysis conducted by the court below. In particular, the extent to which the new convention should regulate parties lacking privity of contract is one of the primary issues before UNCITRAL. Recognizing the growing importance of non-vessel-operating carriers (NVOCs), for example, article 1.1 of the current Draft Instrument defines a carrier not as COGSA § 1(a) does (by reference to the vessel owner or charterer) but as *any* "person that enters into a

petitioner invokes a limitation of liability in another carrier's contract to which it is not a party or a specifically designated beneficiary.

contract of carriage with a shipper." UNCITRAL, *Preliminary Draft Instrument on the Carriage of Goods by Sea*, U.N. doc. no. A/CN.9/WG.III/WP.21, at 9 (Jan. 8, 2002). For the first time, a non-maritime entity such as petitioner would be explicitly recognized as a "performing party," which article 1.17 defines as

> a person other than the carrier that physically performs . . . any of the carrier's responsibilities under a contract of carriage for the carriage, handling, custody, or storage of the goods, to the extent that that person acts, either directly or indirectly, at the carrier's request or under the carrier's supervision or control, regardless of whether that person is a party to, identified in, or has legal responsibility under the contract of carriage.

Id. at 12. Substantively, article 4.2.1 proposes special liability rules to deal with the issues created by inland carriage, *id.* at 21, and article 6.3.1(a) would break through the privity of contract barrier to regulate direct actions by cargo interests against performing parties on defined terms, *id.* at 31. These controversial issues are specifically on the agenda for discussion at the next session of the UNCITRAL Working Group on Transport Law. *See* UNCITRAL, *Provisional Agenda [for the Eleventh Session]*, U.N. doc. no. A/CN.9/WG.III/WP.24, at 6 (Dec. 18, 2002).

Rather than attempting to resolve these controversies itself, this Court should permit the diplomatic and political process to run its course, so that the issues may be resolved in an appropriate forum where all of the affected interests are represented, where related issues can be considered in conjunction with each other (thus enabling balanced compromises to be achieved), and where the necessary legal and commercial expertise can be called upon to inform the decisions. Any decision by this Court in the meantime may have limited impact or even become moot (if the diplomatic and political process adopts a different approach).

C. This case presents a poor vehicle for deciding more generally when a freight forwarder may be deemed a cargo owner's agent

1. Norfolk Southern has taken inconsistent positions on the agency issue and thus its current arguments were never considered by the courts below. Petitioner now argues that ICC was an NVOCC and accepts that it assumed a carrier's liability under its contract with Kirby. *E.g.*, Pet. 14-15 n.4, 16. It simultaneously contends that ICC was Kirby's agent to conclude the contract with Hamburg Süd. Petitioner never explains how ICC could have been both principal and agent with respect to the same obligation – how it could itself assume the obligation for transporting the goods as a carrier while at the same time being simply an agent to contract on Kirby's behalf with another carrier that would assume the same obligation to the same person for transporting the same goods.

Petitioner never explained that inconsistency in the court of appeals either, or even gave the Eleventh Circuit an opportunity to address the contention. In the court below, petitioner had a single argument to explain why ICC must have been Kirby's agent: "ICC Ltd. Is Not An NVOCC Under U.S. Law And Therefore May Not Legally Assume The Role Of A Principal In This Transaction." Norfolk Southern C.A. Br. 25. The Eleventh Circuit described this argument and explained four reasons why it failed. *See* Pet. 10a & n.9; p. 7, *supra*.

In the face of that devastating response, petitioner has completely abandoned its prior argument and now advances the exact opposite of its original contention. Even if its new argument had any merit, this would be a poor vehicle for this Court to consider it. The orderly development of the law would be better served by reviewing a case in which the petitioner had taken a consistent position throughout the litigation, thus giving the lower courts an opportunity to test the arguments and offer their insights on how the arguments might apply in the factual context of the case.

2. Petitioner advances a parade of horribles that it claims will ensue under the Eleventh Circuit's decision, but this is all hyperbole with no basis in fact.[18] Even if the asserted problems were to arise in practice, it is noteworthy that they affect primarily vessel carriers. *See, e.g.*, Pet. 21 ("no vessel carrier will be able to enforce its own bill of lading"); 27 n.10 (asserting that slot charterers will be adversely affected by the decision below). In the unlikely event that any of these problems arise, therefore, it would be more appropriate for this Court to address them, if at all, in a case that concerns a vessel carrier.

II. The Himalaya clause issue does not warrant this Court's review

A. Petitioner improperly frames the question presented by ignoring a critical second aspect of the court of appeals' holding

This Court could decide Norfolk Southern's second question in petitioner's favor but still be obliged to affirm on the court of appeals' second ground for decision, which was that the ICC bill of lading lacked the "special degree of linguistic specificity [that] is required to extend the benefits of a Himalaya clause to an inland carrier." Pet. App. 16a. The court carefully analyzed the cases extending Himalaya clauses to protect inland carriers and concluded that in virtually all of them the bill of lading "specifically referenced inland carriers." *Id.* at 15a. Petitioner neither addresses nor challenges that aspect of the Eleventh Circuit's holding. Accordingly, petitioner has waived any claim that the Eleventh Circuit's "linguistic specificity" holding is erroneous. *See, e.g., Yee v. City of Escondido*, 503 U.S. 519, 535-38 (1992) (the Court will not consider questions that had not been raised in the petition for writ of certiorari).

[18] One of the asserted problems – that this Court's failure to address the issue now will be exploited by forum shopping through *in rem* actions (Pet. 3 n.1) – is completely nonsensical. A railroad cannot be the subject of a maritime lien (an essential prerequisite to the filing of an *in rem* suit). *See* Fed. R. Civ. P. Supp. Admir. & Mar. R. C. So the notion that frustrated cargo owners will file *in rem* actions against a railroad's property in favorable forums lacks any grounding in reality.

B. In any event, this Court's review of the Himalaya clause issue is unnecessary

1. The Eleventh Circuit properly applied *Herd*, which held that a stevedore could not assert a carrier's defenses to liability. As this Court stressed, "contracts purporting to grant immunity from, or limitation of, liability must be strictly construed and limited to intended beneficiaries." 359 U.S. at 305. And it endorsed the "'familiar rules visiting liability upon a tortfeasor for the consequences of his negligence.'" *Id.* (quoting *Boston Metals Co. v. The S/S Winding Gulf*, 349 U.S. 122, 123-24 (1955) (Frankfurter, J., concurring)).

The decision below faithfully applied those principles. As the court noted, longstanding Eleventh Circuit precedent applied a "clarity of language test" that upheld enforcement of "a Himalaya clause only if it is drafted with 'language expressing a clear intent to extend the benefits to a well-defined class of readily identifiable persons'" and "only by members of that well-defined class." Pet. App. 12a (quoting *Hale Container Line*, 137 F.3d at 1465). That holding follows directly from this Court's admonition in *Herd* that courts should narrowly construe an extension of liability limitations by contract. 359 U.S. at 305.

In issuing that ruling, the court below neither explicitly nor implicitly issued a decision of broad scope. Rather, the court carefully parsed the language of the ICC bill of lading to hold that Norfolk Southern was not ICC's independent contractor, as the clause specified (Pet. App. 12a-14a), and that the railroad's status as an inland carrier required the bill of lading to specify with greater clarity an intent to include inland carriers before the Himalaya clause could be extended to them (*id.* at 15a-18a).

2. The Eleventh Circuit decision is not in conflict with the Ninth Circuit. Although Norfolk Southern accuses the court below of "misconceiv[ing] both the facts and analysis of *Akiyama*," Pet. 25 n.8, it is petitioner that mis-

reads the Ninth Circuit. As the court of appeals explained, the *Akiyama* court's statement that a party seeking to invoke the Himalaya clause need not be in privity with the carrier was *dicta*. Pet. App. 14a-15a n.11. The Ninth Circuit's result was consistent with the explanation given by the court below, because privity of contract is not necessary when the term being invoked in the Himalaya clause is descriptive, such as "stevedore" or "terminal operator." The court noted that, in *Akiyama*, the two parties that were permitted to invoke the Himalaya clause either met the privity of contract requirement or fell within the descriptive term of the Himalaya clause: the terminal operator was held to be an "independent contractor," and it was in contractual privity with the carrier, while the stevedore was not in privity but was covered by the definitional clause specifying "stevedores." *See id.*; *Akiyama*, 162 F.3d at 574. The court also explained that the *Akiyama* court's statements about privity were inconsistent with *Mori Seiki*, which had allowed a stevedore to claim Himalaya clause benefits only after establishing that contractual privity had been established with the carrier's agent. 990 F.2d at 450-51.

In contending that the court below "misconceives" the proper analysis (Pet. 25 n.8), Norfolk Southern misunderstands the meaning of *dicta*. The court in *Akiyama* would have come to precisely the same result under the Eleventh Circuit's articulation of the proper rule. Accordingly, the Ninth Circuit's statement about the privity requirement was unnecessary to its decision. Particularly because *Mori Seiki* is also consistent with the Eleventh Circuit's analysis, petitioner can offer no compelling reason why this Court should read a stray sentence in *Akiyama* that was unnecessary to its decision as creating a circuit conflict when one otherwise does not exist.

In view of the Eleventh Circuit's insight about the distinction between "relational" and "descriptive" terms in a Himalaya clause, the respective approaches of the Ninth and Second Circuits can now be reconciled without thinking that those circuits are in conflict. In *Mikinberg v. Baltic S.S. Co.*, 988 F.2d 327 (CA2 1993), the stevedore that was denied protection on the basis of a lack of privity had claimed the benefit of a Himalaya clause using relational terms. *See id.* at 332-33. Indeed, a square conflict would arise only if these two circuits were to go beyond their existing decisions in the following ways: If the Second Circuit follows its announced privity requirement even in a case involving a clause with "descriptive" language (*e.g.*, by denying protection to a sub-subcontractor stevedore despite the Himalaya clause's use of the term "stevedore"), and if the Ninth Circuit follows the *Akiyama dicta* in preference to *Mori Seiki* even in a case involving a clause with "relational" language (*e.g.*, by protecting a sub-subcontractor stevedore in reliance on the term "independent contractor" in the Himalaya clause), then there would be a square conflict. But, absent such holdings, petitioner has no basis for asserting that the decision below would have been different in any other circuit.

3. The Eleventh Circuit's decision neither "undermines the economic basis of international shipping transactions under the FBL" nor "destroys reliance interests." Pet. 28. As the court below explained, *see* Pet. App. 17a; p. 9, *supra*, the FBL Himalaya clause "was not designed" to extend the maritime liability regime to inland carriers.[19] Thus it is not surprising that Norfolk Southern was unable to cite a single case in which a court held that an

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[19] Petitioner calls it "passing strange" to interpret the Himalaya clause (FBL 10.1) to require privity when clause 10.2 provides that the freight forwarder shall act as "agent or trustee for such persons" as shall perform duties under the contract. Pet. 27-28. But there is nothing strange about that provision at all. The point of Clause 10.2 was to deal with the lack of an adequate third-party-beneficiary doctrine under English and Commonwealth law. *See generally* William Tetley, *The Himalaya Clause – Revisited*, 9 J. INT'L MAR. L. 40, 44 (2003). This clause allows the benefits of a contract to be extended under English law to "such persons" (the described third parties, who are in privity with the freight forwarder) without requiring the beneficiaries to also be in privity with the cargo owner.

inland carrier could invoke the Himalaya clause of the FBL.

Any "reliance" that Norfolk Southern asserts in this case is completely untenable for two independent reasons. First, Norfolk Southern is an inland carrier, and no circuit has ever allowed an inland carrier to claim the benefit of any Himalaya clause, whether in the FBL or any other form of bill of lading. The Third, Fourth, and Eleventh Circuits have all addressed the issue and all have denied Himalaya clause protection to inland carriers. *See Caterpillar Overseas, S.A. v. Marine Transp., Inc.*, 900 F.2d 714, 725-26 (CA4 1990); *De Laval Turbine, Inc. v. West India Indus., Inc.*, 502 F.2d 259, 269-70 (CA3 1974). There is no authoritative legal basis for Norfolk Southern's contention that an inland carrier would have been justified in relying on any bill of lading Himalaya clause, let alone the clause at issue here.[20]

Second, Norfolk Southern was a sub-sub-subcontractor of ICC, the issuing carrier. When ICC issued its bill of lading, in August 1997, the Second Circuit's *Mikinberg* rule denying Himalaya clause protection for lack of contractual privity was already well-established, and should have alerted Norfolk Southern that it could not rely on a Himalaya clause in this context. To the extent that any basis for reliance could have been created by the Ninth Circuit's *Akiyama dicta*, that court's decision was not rendered until 1998 – more than a year *after* Norfolk Southern's train derailed.[21]

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[20] Petitioner would also have been unjustified in relying on the phrase in the Himalaya clause covering "other person[s] . . . whose services have been used in order to perform the contract." *See* Pet. App. 67a. The courts of appeals have long held that such broad language does not provide the "clarity" required by this Court in *Herd*. *See, e.g., Rupp v. International Terminal Operating Co.*, 479 F.2d 674, 676-77 (CA2 1973); *Cabot Corp. v. S.S. Mormacscan*, 441 F.2d 476, 478 (CA2 1971). Petitioner cites no case to the contrary.

[21] This may explain why railroads rely on their own "privity of contract" argument, not Himalaya clauses. *See* pp. 18-19 & n.16, *supra*.

Like the agency issue, *see* pp. 20-21, *supra*, petitioner and other inland carriers are fully able to obtain the protection that they seek here simply by entering into appropriate contracts (if the other contracting parties agree). Indeed, the court below provided a road map for petitioner: including the words "inland carrier" in the Himalaya clause will obviate the need for the privity requirement (because "inland carrier" is a "descriptive" rather than a "relational" term) and will satisfy the "linguistic specificity" requirement. *See* Pet. App. 17a-18a. Moreover, Hamburg Süd demonstrated how easy it is to follow this road map, for it had already included adequate language in its Himalaya clause. In short, petitioner does not require this Court's protection. The commercial parties are fully capable of protecting themselves.

4. This Court's review of the second question is also unnecessary because the ongoing diplomatic efforts at UNCITRAL, *see* pp. 3-4, *supra*, are addressing the Himalaya clause issue. Recognizing the problems that have arisen over the years, article 6.3.3 of the current Draft Instrument provides automatic Himalaya protection, *i.e.*, extends the carrier's limitation rights, to certain parties that perform the carrier's responsibilities under the contract of carriage. U.N. doc. no. A/CN.9/WG.III/WP.21, *supra*, at 33. Although the basic concept has received strong support, it remains controversial which parties should qualify for protection. *See, e.g., Comments Submitted by the UNCTAD [United Nations Conference on Trade and Development] Secretariat*, in Annex II, U.N. doc. no. A/CN.9/WG.III/WP.21/Add.1, at 27 (Feb. 6, 2002); UNCITRAL, *General Remarks on the Sphere of Application of the Draft Instrument*, U.N. doc. no. A/CN.9/WG.III/WP.29, at 40 & n.20 (Jan. 31, 2003).

Rather than attempting to resolve the controversy itself, this Court should again permit the diplomatic and political process to run its course. *Cf.* pp. 21-22, *supra*. As with the agency question, the issues would be better resolved in a forum where all of the affected interests are

represented, where related issues can be considered in conjunction with each other, and where the necessary legal and commercial expertise can be called upon to inform the decisions. Any decision by this Court in the meantime may have limited impact or even become moot (if the diplomatic and political process adopts a different approach).

C. This case presents a poor vehicle for deciding when a Himalaya clause may by applied to performing parties that are not in privity with the issuing carrier

Even if this Court were to think that the hypothetical conflict presented by petitioner warranted attention at this time, this case would be a poor vehicle for addressing it. The Eleventh Circuit's alternative ground for decision (the "linguistic specificity" requirement), *see* pp. 8-9, *supra*, would make any decision on the privity issue irrelevant and advisory because the judgment below could be sustained on remand notwithstanding what this Court might hold on the privity issue.

Furthermore, a privity requirement is only significant when the parties appear to have intended the Himalaya clause to cover the defendant seeking protection but a lack of contractual privity would deny such protection. That is not true here. The court below specifically concluded, based primarily on the evidence of the principal authority that petitioner cites for its understanding of the FBL form, that the drafters of the ICC Himalaya clause did not envision its application to railroads and other inland carriers. *See* Pet. App. 17a (citing Ramberg, *supra*). That question necessarily involves an analysis of the Australian contracting parties' intent – not an issue of federal law – and for that reason as well this case presents a poor vehicle for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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